DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 436

[Docket No. EE–RM–94–201]

RIN 1904–AA62

Federal Energy Management and Planning Programs; Energy Savings Performance Contract Procedures and Methods

AGENCY: Department of Energy.

ACTION: Final Rule.

SUMMARY: The Department of Energy gives notice of final rules establishing a five-year pilot program of energy savings performance contracts designed to accelerate investment in cost effective energy conservation measures in existing Federal buildings and thereby save taxpayer dollars. Such contracts typically provide for installation of energy conservation measures financed with private sector funds which are repaid out of the resulting energy cost savings over time. This notice covers the following topics as required by section 801 of the National Energy Conservation Policy Act (42 U.S.C. 8287): qualified contractor lists; procedures and methods to select, monitor, and terminate contracts; and substitute regulations for certain provisions in the Federal Acquisition Regulation which are inconsistent with section 801 and which can be varied consistent with their authorizing legislation.

EFFECTIVE DATE: These rules become effective May 10, 1995.

FOR FURTHER INFORMATION CONTACT: Joan G. Stone, EE–92, Office of Federal Energy Management Programs, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–5772 (regarding the regulations) and the FEMP Help Desk (for a copy of the revised model solicitations) (800) 566–2877.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Department of Energy (Department or DOE) today publishes a notice of final rulemaking which will inaugurate a Congressionally mandated experiment in procurement reform. This experiment involves a pilot program to test for five years the concept of accelerating installation of energy conservation measures in existing Federally owned buildings through energy saving performance contracts. This type of contracting calls for Federal agencies to contract for energy conservation services with performance guarantees and pay for them in the future from the resulting cost savings. If successful, this program will boost the level of energy efficiency investment significantly beyond what can be purchased with appropriated funds. It will also make a contribution to achieving ambitious national energy efficiency goals and to reducing greenhouse gas emissions.

Today DOE is also releasing revised versions of the model solicitations which were made available for public comment. These solicitations provide guidance to implementing Federal agencies on conducting procurement actions consistent with the rules in this notice. DOE will use these model solicitations in training workshops for agency procurement professionals.

On March 10, 1994, the President issued Executive Order 12902, Energy Efficiency and Water Conservation at Federal Facilities (59 FR 11463). Section 401 of the Executive Order requires agencies to utilize energy savings performance contracts to meet the goals and requirements of the Act. With the issuance of today's regulations and the model solicitations, Federal agencies have the regulatory flexibility to comply with the President's management directions. What is necessary now is action by senior agency officials, an appropriate agency priority on employing energy savings performance contracts, development and maintenance of a trained cadre of dedicated procurement personnel, and accountability for results.

Background

On April 11, 1994, (59 FR 17204) DOE published a notice of proposed rulemaking under section 155 of the Energy Policy Act of 1992 (Pub. L. 102–486). Section 155 revised the legislatively mandated policies with regard to energy saving performance contracts originally set forth in sections 801–804 of National Energy Conservation Policy Act (Act). Section 801 specifically authorizes Federal agencies to enter into such a contract for a term not to exceed 25 years. It also provides that such a contract contain provisions requiring the contractor to ''incur costs of implementing energy savings measures, including at least the cost (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel, in exchange for a share of any energy savings directly resulting from implementation of such measures during the term of the contract'' (42 U.S.C. 8287(a)(1)). In addition, the Act specifically authorizes payment of amounts required by an energy savings performance contract ''only from funds appropriated or otherwise made available to the agency . . . for the payment of energy expenses (and related operation and maintenance expenses)'' (42 U.S.C. 8287a). Periodic reporting on progress by Federal agencies in modifying contract practices and in achieving energy savings under contracts is mandated by section 803 of the Act (42 U.S.C. 8287b). Definitions pertinent to sections 801–803 are set forth in section 804 of the Act (42 U.S.C. 8287c).

Section 155 of the Energy Policy Act inserted in section 801 a requirement for DOE to issue appropriate rules containing: (1) Methods and procedures for selecting, monitoring, and terminating energy savings performance contracts; and (2) ''substitute regulations'' for provisions of the Federal Acquisition Regulation (FAR) which are inconsistent with the intent of section 801 as amended and which may be revised consistent with generally applicable procurement statutes. Energy savings performance contracts are designed to reduce the cost of energy in Federal buildings without capital investment by the building owner. Typically, the terms of such a contract provide for contractor purchase, installation, and maintenance of energy conservation measures with a guarantee of annual energy cost savings in consideration for a share of such savings. ''Under these contracts, the contractor is expected to bear the risk of performance, make a significant initial capital investment, guarantee significant energy savings to the government agency, and from these savings, the agency, in effect, makes payment to the contractor.'' H.R. Conf. Rep. No. 102–1018, 102d Cong., 2d Sess., 385, reprinted in 1992, U.S. Code Congressional and Administrative News 2476.

The Act requires that DOE obtain the concurrence of the Federal Acquisition Regulatory Council established under section 25(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 421) in the issuance of the final rule. The Federal Acquisition Regulatory Council has reviewed this notice and has no objection to the issuance of the final rule.

The model solicitations, referred to earlier in this Supplementary Information, provide uniform formats and standardized contract provisions recommended for Federal agency use in energy savings performance contracts. The model or generic solicitations include some provisions that have been

determined necessary to accommodate the unique nature of energy conservation services which often require third-party financing.

II. Discussion of Comments and Other Changes

DOE held a public hearing on June 1, 1994, and the closing date for receipt of written comments was June 10, 1994. Nineteen interested persons filed written comments of which 13 presented oral comments at the public hearing. DOE appreciated all comments and suggestions submitted in response to the proposed rule. DOE was especially appreciative of certain of those written comments that addressed the proposed guidance in the draft model solicitations in addition to the proposed regulations. DOE fully considered all of the suggestions and arguments made in the comments in revising the proposed regulations and the draft model solicitations. In this Supplementary Information section, DOE explains significant changes from the proposed regulations. Included in the explanation are responses to the major policy issues distilled from comments directed at the proposed regulations, as well as from comments directed at the draft model solicitations that had implications for the proposed regulations.

DOE has chosen not to respond to comments that request actions beyond its legal authority to issue regulations. For example, there is no need to respond to policy arguments in comments criticizing DOE's legal conclusions rejecting suggested substitute provisions for the Federal Acquisition Regulation. DOE hereby reaffirms its previously expressed views in this regard.

DOE has sent to each of the commenters a copy of the revised model solicitations and will be scheduling a public meeting at which time there can be a dialog on issues that relate solely to those solicitations. Interested persons who did not comment on the proposed regulations may obtain a copy of the revised model solicitations by calling the FEMP Help Desk at 1–800–566–2877. Any such person may attend the public meeting which will be noticed in the **Federal Register**.

A. Section 436.30 Purpose and Scope

As proposed, 10 CFR § 436.30(c) would encourage competition in utility incentive programs under section 546(c) of the Act. 42 U.S.C. 8256(c). A commenter recommended that language be added to proposed § 436.30(b) which would prohibit agencies from participating in utility incentive programs when the services could be provided by energy service contractors through energy savings performance contracts. Another commenter seeking to maximize competition suggested that the language in § 436.30(c) be revised to ''require'' instead of encourage utilities to select their contractors in a competitive manner. DOE did not accept either of these suggestions because it does not have the authority to regulate agency activities or contractual agreements with regard to utility incentive programs as authorized under section 546 of the Act.

DOE has added a paragraph (d) containing language to ensure that the rules published today are broadly construed when the regulatory language is not restrictive. Permissive language in the regulations (''may'' rather than ''shall'') ordinarily should not be read to limit agency discretion. For example, the express authority to accept unsolicited proposals if certain conditions are satisfied does not preclude agencies from rejecting such a proposal because it prefers competitive solicitations or concludes that the proposal is too narrowly focused on one or two energy conservation measures.

B. Section 436.31 Definitions

Energy Audit

Regarding the definition of ''energy audit,'' commenters generally agreed with the Department's position that specific energy audit requirements should not be prescribed in mandatory regulations. Apart from regulatory provisions requiring there to be energy audits at certain times, the specifics with regard to energy audits appear in the revised model solicitations.

Numerous comments on the model solicitations were received relating to the applicability, rigor, and timing of energy audits which may be conducted by a Federal agency or an energy service company, before or during a contract. Detailed responses to these comments appear later in this Supplementary Information section in the discussion of comments with regard to § 436.33. However, at this point, DOE notes that, in order to promote clarity, the definition of ''energy audit'' has been limited to ''annual energy audits'' that take place during the course of a contract to verify savings and to determine whether to adjust the energy baseline for changes in conditions beyond the contractor's control. This limitation is consistent with the statutory text which uses the term ''energy audit'' only in connection with post award, annual energy audits. DOE has also added definitions for two new terms: ''preliminary energy survey'' and ''detailed energy survey.'' These two terms refer to audit-type procedures which may precede contractor selection and contract award, respectively.

Energy Conservation Measures

One commenter recommended that the definition of ''energy conservation measures'' include language which addresses ''other environmental improvements'' to encompass technological breakthroughs. DOE did not incorporate this comment into the rule because DOE has no authority under 42 U.S.C. 8287c to include the additional language.

Energy Cost Savings and Energy Savings

One commenter suggested that the statutory definition of ''energy savings'' in section 804 of the Act be included in the rule instead of the proposed ''Energy Cost Savings'' definition. Further, the commenter suggested that the proposed definition of the term ''Energy Savings'' be changed to ''Energy Unit Savings.''

DOE has accepted the latter suggestion because it implies in plain English that the measure of savings is in physical units. However, DOE has decided to retain ''energy cost savings'' as the defined term for savings measured in dollars. In general, DOE prefers to use defined terms which have definitions close to normal usage.

Some of the comments indicated uncertainty about the extent to which energy-related operation and maintenance cost savings are included in the definition of ''energy cost savings.'' DOE recognizes that the law allows a contractor to be paid from savings in related operation and maintenance costs, if the contractor assumes responsibility for operations or maintenance of equipment it has retrofitted or replaced and which is currently covered in an operation and maintenance service contract.

One commenter recommended that DOE consider how ''soft savings'' should be defined and considered. Examples of soft savings are increased worker productivity and extended equipment life. DOE has decided not to address soft savings in the final rule because it is too subjective and difficult to measure accurately.

Energy Savings Performance Contracts

A commenter asked DOE to clarify whether the procedures in the rule for energy savings performance contracts apply to water conservation projects. DOE did not include water conservation in the definition for ''energy savings performance contracts'' in the rule because water conservation was not

included in the definition in 42 U.S.C. 8287c.

C. Section 436.32 Qualified Contractor List

Paragraph (a) of 436.32 provides for annual notices in the Commerce Business Daily inviting submission of new statements of qualification and requiring submission by listed firms of updates to their statements as appropriate. This provision differs from the proposed rule only to the extent that the wording has been altered to make clear that submission of updated information is required.

One of the commenters on proposed § 436.32(a) argued that an annual update of the qualified list may unnecessarily restrict competition. Furthermore, the commenter argued that the usefulness of any such list may be limited by the age of the information provided by contractors. This commenter recommended that the list should be open continuously to add qualified contractors. Although an annual notice will be published, DOE will allow potential contractors that are not on a qualified list to submit a statement of qualifications at any time. DOE agrees that this will assist in increasing competition among firms.

The proposed rule provided for updating statements of qualifications, but did not make explicit that a firm could be delisted for failure to respond or because new information warranted disqualification. Paragraph (c) of § 436.32 remedies that omission.

The preamble to the proposed rule set forth two questionnaires which would be used to establish the qualified list of firms as provided under paragraph (a) of § 436.32. In response to DOE's request for public comments on the adequacy of the questionnaires, a number of firms submitted comments. The most significant of these are addressed below. These questionnaires have been revised based on public comments as discussed below. A copy of them is set forth after a discussion of public comments.

DOE agrees with commenters that it would be difficult for firms to identify all associates and subcontractors without the knowledge of specific projects and its location. The questionnaire was revised by deleting the requirement for the identification of subcontractors.

A commenter recommended that the table under ''EXPERIENCE,'' seeking a five year summary of contract values for energy-related services, be clarified. It was noted that the total project cost had little bearing on technical ability or project management expertise. Based on this comment, the table was deleted, and a question was added to ''Financial Status'' requesting the largest capital investment for an energy savings performance contract for which the firm acquired financing.

Some of the commenters criticized the request for all legal or administrative proceedings pending or concluded adversely against firms within the last five years relating to procurement or performance of construction contracts. The commenter argued that: (1) Responding to the request would be too burdensome; (2) adverse judgments may not have an impact on a firm's financial status; and (3) the information would be sought and reviewed by a contracting officer in any event prior to award. DOE has accepted these comments and has deleted the request.

A commenter was concerned about the disclosure of proprietary information provided on their statements of qualifications. In the Department's view, information in a firm's statement of qualifications will be subject to the same restrictions on disclosure of proprietary and business sensitive information as other proposals and documents submitted to the Federal government by private firms. The Department does not believe any additional restrictions are necessary or advisable.

One of the comments suggested that the questionnaire should include questions about potential performance guarantors, and argued that the best interests of the government would be served if the qualified list did not include a firm that would rely on a legally separate guarantor in which the firm has an indirect financial interest. Contrary to this comment, DOE has concluded that the questionnaire should not include questions about potential performance guarantors because a firm's decision to seek insurance, regardless of source, is not relevant to determining whether a firm has the minimum qualifications to provide energy savings performance services.

Comments received on the experience criteria were divided. Some comments argued that new firms may have difficulty meeting the two year experience requirements, even if they have experienced personnel, and that reputable firms would have difficulty qualifying if they have no performance contracting experience. Another commenter stated that two successful contracts with two clients should be sufficient for qualification. To broaden the list of qualified firms and increase competition, paragraph (b)(1) of § 436.32 has been revised to allow contractors to qualify if they provide two contracts for installation of energy conservation measures, regardless of whether they are energy savings performance contracts, and if they otherwise have appropriate project experience showing success in using energy conservation technologies.

In response to comments that the draft experience criteria should remain unchanged because firms without a proven track record may not generate energy savings, DOE observes that the qualified list is an initial screening, and agencies will independently review a firm's qualifications through their source selection process and determine whether or not a firm has the ability to generate savings.

A question was asked by one commenter as to the effect a decision by DOE with respect to inclusion on the qualified contractors list would have on a contracting officer's obligation to refer nonresponsibility determinations to the Small Business Administration under FAR 19.602. Section 801(b)(2) of the Act authorizes the Department to establish a list of qualified contractors and requires agencies to use this list, or one developed in the same manner by the agency itself. Furthermore, agencies are authorized by the Act to select firms from the list to conduct discussions concerning a particular project. While this rule establishes certain criteria for inclusion of a firm on the list, the contracting officer is still required to make a responsibility determination on a procurement-specific basis. A decision that a particular small business is not ''qualified'' and, therefore, not eligible to be included on the qualified contractors list is not a determination of non-responsibility and has no effect on a contracting officer's obligation to make responsibility determinations.

Under paragraph (b)(2) of proposed § 436.32, a firm would have to be rated fair or better by its project clients to meet the minimum criteria. Commenters argued that the minimum criteria be raised to a rating above ''fair.'' DOE decided not to accept this comment. Instead the client questionnaire was revised to add ''recommend contractor'' to the rating of ''fair'' to make it clear that even though there was room for improved quality and performance, the client would still give the firm a positive recommendation because the firm met the project objective. With this modification of the questionnaire, DOE believes that a client rating of fair or better is sufficient to consider a firm for the qualified list. During the actual source selection process, agencies will independently make the determination whether a firm meets the minimum requirements to accomplish a specific project.

Commenters recommended that paragraph (b)(4) of proposed § 436.32 be changed by adding a statement related to the financial strength of the firm to provide adequate bonding. This was not included in the qualification process because agencies will address a firm's bonding capabilities prior to the award of a specific contract.

A commenter recommended that paragraph (c) of proposed § 436.32 should be revised to allow any Federal agency to enter into sole source contracts with firms competitively selected by local utilities. This recommendation was not incorporated in the final rule because DOE has no authority under 42 U.S.C. § 8287 to implement it.

One commenter recommended that firms not selected for inclusion on the qualified contractors list be given an opportunity to comment on adverse information short of filing an appeal to the General Services Administration Board of Contract Appeals. Section 436.32(d) of the rule provides firms found not to be qualified the opportunity for a debriefing from a DOE official. In the Department's view, this should provide an efficient informal method for advising a disappointed firm of the basis for the Department's decision. Furthermore, since the list will be updated on a continual basis rather than annually, firms will be able to provide corrected or supplemented statements of qualifications for consideration by the Department at any time.

Following are questionnaires the Department plans to use for establishing the qualified list:

1. General Information

(a) Name and address of firm:
(b) Telephone No.:
Fax No.:
(c) Indicate type of firm:
_____ Partnership
_____ Corporation
_____ Sole proprietor
_____ Branch Office of
_____
_____ Joint Venture (List venture partners)
_____
_____
_____Other (Explain) _____
(d) This submittal applies to:
[ ] Parent Company
[ ] Subsidiary
[ ] Division
[ ] Branch Office
[ ] Other

List the names of any of the above marked entities which are to be considered in the prequalification process, and describe their functions, responsibilities, and interrelationships.

(e) Names and titles of two people authorized to represent the firm
(f) Federal Employer Identification Number
(g) Year firm was established
(h) Name and address of parent company (if applicable)
(i) Indicate previous names of firm:
_____
(j) Has your firm been competitively selected by a Utility Company under a Demand-Side Management Bidding program to provide conservation services for commercial and industrial customers? Yes _____ No _____ If yes, please designate the utility and provide pertinent information.
(k) Indicate the largest dollar value of investment your firm would consider for a Federal Government energy savings performance contract (ESPC)
(l) Indicate the regions of the country your firm would consider providing Federal ESPC services
[ ] Region 1 (CT, ME, NH, VT, MA, RI)
[ ] Region 2 (NY, NJ)
[ ] Region 3 (MD, DE, VA, WV, DC, PA)
[ ] Region 4 (FL, GA, KY, MS, NC, SC, TN, AL)
[ ] Region 5 (IL, IN, MI, MN, OH, WI)
[ ] Region 6 (AR, LA, NM, OK, TX)
[ ] Region 7 (IA, KS, MO, NE)
[ ] Region 8 (CO, MT, ND, SD, UT, WY)
[ ] Region 9 (CA, AZ, NV, HI)
[ ] Region 10 (WA, OR, AK, ID)
[ ] All Regions
[ ] Territories
[ ] Overseas Facilities
[ ] Exceptions (specify) _____

2. Experience

(a) List and briefly describe two projects completed by your firm that have been operating and saving energy or reducing utility costs and that best illustrate your range of experience relative to energy savings performance contracting or energy management expertise (e.g., type of technologies implemented). If your firm does not possess ESPC experience with the technologies for which you want to be qualified, provide the experience of your firm in implementing other technologies. One project should represent the largest project completed, and the other should represent a recently completed project. For each project, provide information on the following items:

1) Project title and location.

2) Client to contact regarding the project, his or her position, address, and telephone number.

3) Whether the project was for public or private sector.

4) Briefly describe the facility including function, number of buildings, and size in square feet.

5) Total contract amount.

6) Type of financing arranged by your firm.

7) Type and term of contract.

8) Starting and ending dates.

9) Whether the project was completed on schedule. If not, explain.

10) Projected annual energy savings and/or demand reduction.

11) Performance guarantees, if performance-based energy service contract.

12) Actual annual energy savings and/or demand reduction achieved for each project.

13) Notes, explanations, or any other information relating to the project. (Optional)

(b) Indicate the number of years in business as an Energy Management Contractor: _____ years. Indicate all other names for your firm and the length of time your firm had that name.

3. Technical Capability

List the technologies (e.g., lighting; HVAC systems) which your firm may propose to apply to a building or facility to implement energy conservation measures under an energy savings performance contract.

4. Available Staff

(a) Indicate the experience in energy management and energy conservation services of the personnel in your firm that you are intending to utilize on projects.

(b) List all professional and skilled trades which your firm customarily performs with your own employees.

5. Financial Status

(a) For each year in the last five years, identify the largest capital investment for an ESPC in which your firm acquired financing.

(b) State whether your firm (or predecessors, if any) or any principal of the firm has been insolvent or declared to be in bankruptcy within the past 5 years.

(c) Indicate whether your firm or any principal of the firm has been debarred by the Federal Government and provide explanation.

The following is the revised questionnaire that the firm will send to two of its clients:

1. Was the project completed on schedule?

2. Did contract involve energy savings performance guarantees? If so, describe performance guarantees (e.g., annual energy or cost savings).

3. Did the installed project achieve energy savings and/or demand reduction projected or guaranteed by contractor?

4. Was the method(s) used by the contractor to determine annual energy savings and/or demand reduction acceptable for the type of energy conservation measures installed?

5. Did the contractor provide satisfactory operations, maintenance, and repair services, if any?

6. Were rebates from the utility in your area available to you? If yes, did the contractor arrange satisfactory utility supplier rebates or other financial incentives?

7. Did the contractor provide or arrange satisfactory project financing?

8. What was your total compensation under the contract?

---

9. Provide a rating, using the categories identified below, of your overall satisfaction with the services provided by the contractor. Please briefly explain your reasons for giving a rating of ''Fair'' or ''Poor,'' as applicable.

[ ] *Excellent*—Exceeded expectations, highly recommend contractor.

[ ] *Good*—Met all requirements, recommend contractor.

[ ] *Fair*—Achieved project objective, room for improved quality and performance, recommend contractor.

[ ] *Poor*—Significant shortfall in meeting contractual requirements, would not recommend.

If an accreditation process by a professional association effectively covers some or all of the information requested through this survey, evidence of accreditation could be submitted in lieu of the relevant portion(s) of this questionnaire.

D. Section 436.33 Procedures and Methods for Contractor Selection

The proposed contractor selection methods and procedures in the proposed rule and in the model solicitations attracted substantial comment. Several commenters provided detailed critiques of the method for competitive selection of contractors. In their view, the Department's proposed method of contract award would be more expensive for prospective contractors and expose them to more risk than the usual method under which such contracts are awarded in the private sector. Under the draft model solicitations, all potential contractors would conduct ''investment-grade'' audits before submitting a proposal. This is an expensive undertaking which, the commenters argued, would discourage firms from competing and from offering a comprehensive package of energy conservation measures.

The foregoing comments led the Department to rethink the method for competitive selection of contractors. Both the proposed regulations and the draft model solicitations have been revised to provide Federal agencies the option to use a two stage proposal process instead of the more conventional selection process. In the first stage, the Federal agency would solicit initial proposals. In the solicitation, the Federal agency could release whatever data it had about a building, indicate what energy conservation measures should be included in a proposal, and allow potential proposers the opportunity to conduct a ''preliminary energy survey.'' Upon receipt of proposals, the Federal agency would preliminarily select a proposer and announce an intent to make an award. However, prior to award, the Federal agency would have the option to require a selectee to conduct a ''detailed energy survey'' to confirm or modify its proposal, subject to the condition that the confirmed or modified proposal would include a performance guarantee that does not reduce the energy cost savings estimated in the initial proposal more than a fixed percentage set forth in the solicitation. If this condition is not met, the Federal agency may select another firm from among those submitting initial proposals. On the other hand, as the model solicitation provides, if the detailed energy survey revealed previously unsuspected potential savings, the contract award could include the additional energy conservation measures.

DOE decided to describe pre-award energy auditing procedures as energy surveys because section 801 of the Act only refers to ''annual energy audits.'' The difference between a ''preliminary energy survey'' and a ''detailed energy survey'' is the degree of rigor in the survey. The former would be in the nature of what some of the comments described as a ''scoping audit,'' and the latter could resemble what some of the comments described as ''investment grade audits.'' There would be no obligation on a Federal agency to require a ''preliminary energy survey,'' and if existing data were sufficient, then there would be no functional purpose to such survey. The degree of rigor in a ''detailed energy survey'' would be a function of how much information a proposer who has been selected for award needs to confirm or modify a proposed performance guarantee. The Department is of the view that selection for award should be enough of an inducement for a proposer to undertake the risk of conducting a ''detailed energy survey'' that might not lead to an award. The Department believes that this change in the method of selecting a contractor will reduce cost and risk for potential contractors and, thereby, increase competition in energy savings performance contracting for the Federal Government.

One commenter objected to the provision in proposed § 436.33(a)(1) that agencies ''request the submission of 'intent to propose' statements from all firms on the list who may be interested in proposing'' and that selection of the contractor be from those firms submitting ''intent to propose'' statements. The commenter considered this provision inconsistent with the statutorily-based requirement in 48 CFR subpart 5.2 that proposed contract actions be synopsized in the Commerce Business Daily. The Department agrees with this comment and has revised § 436.33(a) of the rule to provide for issuance of a CBD notice to inform interested firms of a planned energy savings performance contract. DOE has decided that the proposed rule requirement for submission of an ''intent to propose'' statement for firms on the qualified list is unnecessary in light of the decision to use a CBD notice to inform firms of a performance contract action.

Section 436.33(a)(4) of the proposed rule stated that a contractor may be competitively selected based on proposals for a representative sample of buildings at a large facility. The agency may then request further proposals from the contractor for all or some of the remaining buildings at the site. One commenter suggested the addition of language to this section clarifying that the agency is not obligated to award a contract or contracts to the selected contractor based on such further proposals. The agency is free to conduct additional competitions covering the other buildings. The Department agrees that agencies should be free to conduct such a competition, but does not agree that this clarification is necessary because the regulatory provision is worded permissively. It states what an agency ''may'' do and not what it must do.

Some commenters expressed concern about the protection of proprietary and confidential information that may be contained in unsolicited proposals.

Section 801(b)(2)(C)(iii) of the Act requires Federal agencies to publish a notice in the Commerce Business Daily regarding the receipt of an unsolicited proposal and inviting other qualified firms to submit competing proposals. In the Department's view, the content of such notices, as well as unsolicited proposals themselves, will be subject to the same restrictions on disclosure of proprietary and business sensitive information as other proposals and documents submitted to the Federal government by private firms. The Department does not believe any additional restrictions are necessary or advisable.

One commenter recommended that the proposed rule be revised to permit the submission of unsolicited proposals from any firm, not just those on the qualified contractors list. The commenter contended that this provision in the proposed rule is an unnecessary limitation which is inconsistent with section 801 of the Act. The Department does not agree with this comment. Section 801(b) of the Act permits receipt of unsolicited proposals from those companies that are ''qualified.'' The word ''qualified'' is used in connection to the statutory provisions governing the qualified contractor's list. As used in context, ''qualified'' appears to apply only to companies on the qualified contractors list. Firms will be able, under the final rule, to submit statements of qualifications at any time and may be added to the list if found to be qualified. Thus the limitation in section 801 of the Act on unsolicited proposals should not act as an impediment to firms wishing to submit such a proposal.

One commenter suggested the deletion from § 436.33(b) of the reference to the statutory provisions (10 U.S.C. 2304(c)(5) and 41 U.S.C. 253(c)(5)) which permit other than full and open competition when ''authorized or required by law.'' The commenter argued that the procedures and methods established pursuant to section 801(b)(2) of the Act constitute ''competitive'' procedures for the selection of energy savings performance contractors. In considering this comment, the Department examined the applicability of the Competition in Contracting Act provisions to the ''procedures and methods'' which the Energy Policy Act requires the Secretary of Energy to establish for the selection, monitoring and termination of contracts with energy savings performance contractors. The Department has concluded that, under 41 U.S.C. 253(a)(1), the procedures and methods required by the Act are ''procurement procedures otherwise expressly authorized by statute,'' and, as a consequence, are exempt from the Competition in Contracting Act's requirement for full and open competition. Accordingly, the reference to 10 U.S.C. 2304(c)(5) and 41 U.S.C. 253(c)(5) has been deleted in the final rule.

The Department has added language to § 436.33(b) to clarify that, with respect to the receipt of unsolicited proposals for energy savings performance contracts, the provisions contained in § 436.33 apply instead of the following Federal Acquisition Regulation provisions which relate to the treatment of unsolicited proposals: 48 CFR 15.503(a) and (c); 48 CFR 15.506–2(a)(1); 48 CFR 15.507(a), (b)(2), (b)(3), (b)(4) and (b)(5). These provisions have been made inapplicable because they relate to the requirement in the Federal Acquisition Regulation that unsolicited proposals must be unique and innovative. This requirement does not apply to the selection and award of energy savings performance contracts.

One commenter objected to the prohibition in proposed § 436.33(b)(2) against an award of an energy savings performance contract based on an unsolicited proposal ''if there are other energy conservation measures which reasonably could be implemented in the existing Federally owned building or facility.'' This proposed prohibition, in the commenter's view, is overly broad and vague and could make the award of energy savings performance contracts on the basis of unsolicited proposals difficult if not impossible. The Department agrees that the proposed limitation is unnecessarily restrictive and is not required by the Act. Thus the Department has deleted it.

The proposed rule did not purport to restrict agency awards based on unsolicited proposals where no response is received to a Commerce Business Daily notice. However, there was concern expressed in the comments about acceptance of such an unsolicited proposal if it focused exclusively on a small number of energy conservation measures and ignored other significant opportunities to increase energy efficiency. Although refusal to accept an unsolicited proposal could be predicated on an excessively narrow focus, DOE is not prepared to require that agencies reject all unsolicited proposals with only one or two energy conservation measures. The facts and circumstances may warrant agency acceptance of such a proposal. Accordingly, DOE has restructured paragraph (b) of § 436.33 into three paragraphs to make the policies on unsolicited proposals easier to read, and paragraph (b)(2) makes explicit that an agency may reject an unsolicited proposal because it is too narrow in scope.

One of the commenters expressed an interest in clarification of paragraph (c) of proposed § 436.33 which purported to recognize the authority of the Department of Defense under other law, 10 U.S.C. 2865, to negotiate ''energy savings performance contracts'' with contractors selected competitively by utilities. Another commenter argued for deletion of paragraph (c) because it could be a source of potential confusion. DOE has opted to delete the paragraph because construction and application of 10 U.S.C. 2865 is the responsibility of the Department of Defense.

Almost all commenters agreed with the Department's preliminary determination that the requirement for submission of certified cost or pricing data should be waived. These commenters provided additional support for the conclusion that this requirement is inconsistent with the intent of section 801 of the Act. They pointed out that, under energy savings performance contracts: (1) The government makes no up-front payments to the contractor; (2) the risk of performance is entirely with the contractor; and (3) the government only pays the contractor out of verified savings that result from the services performed by the contractor. They emphasized the expense and administrative burden that submission of certified cost or pricing data and compliance with cost accounting standards represent to energy service companies. A number of commenters noted that, for smaller companies, compliance with these requirements might pose a significant impediment to competing for government contracts.

Two commenters questioned DOE's authority to waive the requirement for submission of certified cost or pricing data for other Federal agencies. They also pointed out that the Truth in Negotiations Act, which requires the certification, was designed to assist the government in negotiating fair and reasonable prices and that energy savings performance contracts must be awarded at fair and reasonable prices.

The Department agrees that in most cases the waiver authority provided by law appropriately resides with the head of the procuring activity awarding the contract (§ 304A(b)(1)(B) of the Federal Property and Administrative Services Act of 1949). In the case of energy savings performance contracts, however, the Energy Policy Act expressly directs the Secretary of Energy to establish

methods and procedures for selecting, monitoring and terminating such contracts. Other agencies are required to follow these procedures if they wish to enter into an energy savings performance contract. Consequently, the Department has concluded that it has the necessary authority to find that energy savings performance contracts as a class are ''an exceptional case'' and to direct the heads of procuring activities to waive the requirement for the submission of certified cost or pricing data for such contracts.

It should be noted, however, that waiver of the requirement for certified cost or pricing data is not intended to preclude contracting officers from requesting information considered necessary to determine whether a contractor's prices are fair and reasonable. Language has been added to § 436.33(c) to provide that the waiver does not preclude agencies from requesting the submission of pricing and related financial information as part of contract proposals.

One commenter suggested that the rule itself, rather than merely the preamble, contain a provision stating that energy savings performance contracts are firm fixed-price contracts. The Department agrees with this comment and has added appropriate language which appears in § 436.33(c) of the final rule.

E. Section 436.34 Multi-year Contracts

In editing the proposed rules, DOE decided to reorganize some of the provisions by redesignating proposed § 436.35(e) as § 436.34. Paragraph (a)(2) has been reworded to make it clearer that the funding condition prerequisite for a multiyear contract only requires that appropriations for the costs of the first fiscal year (not the total contract term) must be available and adequate. DOE has also added a new paragraph (b) to § 436.34 designed to prevent misunderstanding of paragraph (a)(2). The new paragraph reinforces the plain meaning of paragraph (a)(2) because some agency officials, on the basis of an inappropriate excess of caution, may be inclined to construe paragraph (a)(2) or other provisions of the Act or the regulations to require that agencies have adequate and available appropriated funds to pay for contract costs of the entire multiyear term of the contract. Such a requirement would amount to a crippling interpretation of the Act and these regulations, and would be inconsistent with the literal meaning of relevant statutory and regulatory provisions and with the underlying Congressional intent.

DOE has redesignated proposed paragraph (b) as paragraph (a)(4) and has added language to clarify that the establishment of a cancellation ceiling is required in the case of a multiyear energy savings performance contract under this part.

F. Section 436.35 Standard Terms and Conditions

Proposed § 436.34 has been redesignated as § 436.35(a). It is not an exclusive list of contractual terms and conditions. The items covered involve subjects not specifically addressed by the Act (e.g., financing agreements and disposition of title) or statutory requirements that need some interpretation (e.g., provision for conduct of the annual energy audits). A phrase has been added to paragraph (a)(1) to make clear that a clause pertinent to the risk of default on financing would be unnecessary if there is no third party financing. Language has also been added to paragraph (a)(1) to require contracting officers to consider any expected change in the performance of equipment which the contractor is proposing to modify or replace.

Paragraph (c) of proposed § 436.34, which has been redesignated as paragraph (a)(3) of § 436.35, indicated that a contract should contain a clause on ''final'' disposition of title to systems and equipment. DOE deleted the word ''final'' to avoid any ambiguity with regard to whether an agency may negotiate a clause delaying the disposition decision until some future point in time during the contract term.

Comments were received concerning the need for a lender to acquire a security interest in installed energy conservation measures. DOE added language in a new paragraph (b) to clarify that energy savings performance contracts may permit a financing source to acquire a security interest in the installed systems and equipment. DOE also shifted proposed § 436.34(a) to § 436.35(b) so that the regulatory policy on third party financing is located in a single paragraph and stated permissively.

G. Section 436.36 Conditions of Payment

Section 436.36 was proposed as § 435.35. The section title has been changed from ''Funding'' to ''Conditions of Payment'' in order to make it easier to identify the subject matter covered by the text.

H. Section 436.37 Annual Energy Audits

Section 436.37 was proposed as § 436.36. In order to identify the subject matter more clearly, the section title was changed from ''Procedures and methods to monitor contracts'' to ''Annual energy audits.''

As discussed above, the term ''energy audit'' used in the proposed rule in § 436.36 will be changed in the final rule to ''annual energy audit'' to clarify that the procedures for monitoring contracts refer only to annual energy audits used to verify post-installation energy savings performance annually as required by section 801 of the Act. The ''annual energy audit'' refers to an energy savings measurement and verification procedure or method agreed to in the contract and occurs after energy conservation measures are installed and operational and annually thereafter throughout the contract term. The Department recognizes that it is common industry practice to monitor the energy savings performance of contractor installed measures on a monthly basis. However, the final rule incorporates an annual energy audit requirement, which at the Federal agency's discretion, may be an annual review and confirmation of cumulative monthly energy savings reports submitted by the contractor over a year.

A few commenters suggested that the hiring of an independent consultant by the contractor to conduct annual verification of savings guarantees created the appearance of a conflict of interest. Commenters recommended that the Federal agency verify the annual energy savings performance itself, or if it lacked the in-house expertise, pay for an independent consultant to perform the annual energy audits. One commenter suggested that if the agency could not perform annual savings verification and paying for consultant services for the same was not practicable, it could consider utilizing a consultant hired by the contractor and approved by the government. The Department recognizes that the Federal agency has an obligation to verify energy savings performance which is the basis of payment and to confirm that the government has received contracted annual energy savings. The Department therefore agrees with the suggestion that the federal agency is ultimately responsible for verifying annual energy savings. This may involve an in-house review of monthly energy savings reports generated by measurement and verification protocols incorporated in the contract, or may involve use of a consultant as needed. The Department has modified the proposed regulatory provisions applicable to annual energy audits, and § 436.37 reflects these modifications.

Extensive public comment was received on the issue of annual energy audits, energy baselines, and energy savings measurement and verification protocols generally. Many comments supported DOE's proposal to avoid the use of a prescriptive method for developing energy baselines or conducting post installation or annual energy audits. Other commenters suggested, however, the adoption of standardized measurement and verification protocols such as those used in utility Demand Side Management programs in New Jersey and California which were developed collaboratively by members of the energy services and utility industries. The Department recognizes the value that standardizing methods or protocols would have on streamlining or improving government evaluations of performance contract proposals, particularly for proposals with various energy conservation measures. However, the Department will not regulate the methods or procedures for establishing energy savings performance, as there are currently no recognized national standards or protocols available for energy savings measurement and verification. The Department, however, plans to use the existing measurement and verification protocols recommended by several commenters in Federal agency energy savings performance contracting training materials to expose federal personnel to various techniques, methods and procedures used in the energy services and utility industries to validate energy savings performance. The Department is actively participating in a collaborative process with the private sector to develop a national consensus protocol for monitoring and verification of energy service performance contracts. That protocol is expected to be available in early 1996. In the near term, the Department plans to provide direct technical assistance to agencies relating to negotiation of contracts which include mechanisms to verify energy savings performance.

One commenter suggested that two factors should be added to the list of factors contributing to energy baseline adjustments in § 436.36(b). The recommended additional factors were ''Utility rates'' and ''Major change of use.'' The Department agrees with the suggestion of adding ''(7) Utility rates,'' but ''Major change of use'' is considered too ambiguous to be included the final rule.

I. Section 436.38 Terminating Contracts

Section 436.38 was proposed as § 436.37. The section title has been shortened from ''Procedures and methods to terminate contracts.''

Comments were provided with respect to the appropriate provisions and methods for terminating an energy savings performance contract in the event of a termination for the convenience of the government or a termination for default. One commenter provided a very detailed discussion of this subject, asserting that, even when the Federal agency is receiving the guaranteed energy cost savings, a termination for convenience could result in the contractor incurring a loss on the contract. The commenter argues further that, because the termination for convenience provisions of the Federal Acquisition Regulation focus on costs incurred by the contractor in performing the work, many of the standard provisions are inappropriate for contracts based solely on the energy cost savings realized by the Federal agency.

Although DOE agrees that contractor compensation under an energy savings performance contract is not tied to costs incurred, the Department is not persuaded that the use of the standard termination for convenience clause would result in a financial loss for the contractor. In the Department's view, if an energy savings performance contract is terminated for the convenience of the government, the contractor could expect to recover its capital investment, any incurred maintenance and repair costs (services), financing costs (including any prepayment penalty) and a reasonable profit. As provided in § 436.35(a)(6) of the rule, ''financial charges'' are appropriate costs which are to be reflected in payment schedules under energy savings performance contracts.

In the example provided by the commenter in which the realized energy savings fall considerably short of the guaranteed savings amount, the commenter argued for special termination provisions on the theory that there is little incentive for the agency to terminate the contract, since the contractor is required to continue paying the agency the guaranteed amount whether or not that amount of savings is realized. DOE is not persuaded by this argument because it is based on the faulty premise that a contractor would have no right to a baseline adjustment. Section 436.37 provides for such an adjustment in appropriate circumstances and anticipates that the details will be negotiated as part of the contract.

The Department recognizes that, unlike contract termination under the Federal Acquisition Regulation, termination of an energy savings performance contract in the private sector is usually governed by a schedule of termination amounts for each year of the contract, which is negotiated and agreed to between the parties at the time of entering into the contract. While the Department is not persuaded that this termination method should be ''substituted'' for the standard termination provisions in the Federal Acquisition Regulation, agencies may consider such an approach on a contract-specific basis.

The provisions of the proposed rule on termination were consistent with the Federal Acquisition Regulation. To clarify this, a new paragraph (a) has been added to reference the applicable part of the Federal Acquisition Regulation, 48 CFR part 49. Proposed paragraph (a) has been retained as paragraph (b) to reinforce the requirement that the termination liability of the Federal agency may not exceed the cancellation ceiling set forth in the contract. Proposed paragraph (b) has been deleted as unnecessary.

III. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, it was subject to review by the Office of Information and Regulatory Affairs (OIRA). OIRA completed its review without requesting any substantive changes.

B. Review Under the Regulatory Flexibility Act

The rules were reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96–354, which requires preparation of a regulatory analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. DOE certifies that these rules will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

C. Review Under the Paperwork Reduction Act

New information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, or recordkeeping requirements are proposed by this rulemaking. Accordingly, this notice has been submitted to the Office of Management and Budget for review and approval of the paperwork requirements. Earlier in this notice, DOE described two

questionnaires for use under the rule. The first involved a contractor's qualifications for inclusion on the qualified contractors list. The second would be directed at clients of a contractor applicant for inclusion on the list in order to obtain project specific information with regard to the client's experience with the contractor.

The information DOE proposes to collect on the above-described questionnaires is necessary to determine whether a contractor is adequately experienced and reliable to be placed on the qualified contractors list. DOE believes that in the typical case the frequency of response will be once every 12 months. After the initial application is filed, a successful contractor would only have to update information which might have changed during the interim. The public reporting burden is estimated to average less than two hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing the questionnaire.

On August 8, 1994, OMB approved the collection of information through August 1997 and assigned approval number 1910–0067.

D. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR 1500–1508), the Department of Energy has established guidelines for its compliance with the provisions of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321, *et seq.*). Pursuant to Appendix A of Subpart D of 10 CFR Part 1021, National Environmental Policy Act Implementing Procedures (57 FR 15122, 15152, April 24, 1992) (Categorical Exclusion A6), the Department of Energy has determined that these rules are categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

E. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. These rules will revise certain policy and procedural requirements applicable only to Federal contracts. Therefore, the Department of Energy has determined that these rules will not have a substantial direct effect on the institutional interests or traditional functions of States.

F. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in section 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation: specifies clearly any preemptive effect, effect on existing Federal law or regulation, and retroactive effect; describes any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms. DOE certifies that these rules meet the requirements of section 2(a) and (b) of Executive Order 12778.

List of Subjects in 10 CFR Part 436

Energy conservation; Federal buildings and facilities; Reporting and recordkeeping requirements; Solar energy.

Issued in Washington, D.C. on this 31st day of March 1995.

Peter S. Fox-Penner,

Prinicpal Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, Part 436 of Title 10, Subchapter D of the Code of Federal Regulations is amended as set forth below:

PART 436—FEDERAL ENERGY MANAGEMENT AND PLANNING PROGRAMS

1. The authority citation for Part 436 is revised to read as follows:

42 U.S.C. § 6361; 42 U.S.C. 8251–8263; 42 U.S.C. 8287–8287c.

2. Section 436.2 is amended by removing the word ''and'' after the semicolon at the end of paragraph (b), redesignating paragraph (c) as paragraph (d), and adding a new paragraph (c) as follows:

§ 436.2 General objectives.

* * * * *

(c) To promote the use of energy savings performance contracts by Federal agencies for implementation of privately financed investment in building and facility energy conservation measures for existing Federally owned buildings; and

* * * * *

3. New Subpart B, consisting of sections 436.30 through 436.38, is added to read as follows:

Subpart B—Methods and Procedures for Energy Savings Performance Contracting

Sec.

Subpart B—Methods and Procedures for Energy Savings Performance Contracting

§ 436.30 Purpose and scope.

(a) *General.* This subpart provides procedures and methods which apply to Federal agencies with regard to the award and administration of energy savings performance contracts awarded within five years of May 10, 1995. This subpart applies in addition to the Federal Acquisition Regulation at Title 48 of the CFR and related Federal agency regulations. The provisions of this subpart are controlling with regard to energy savings performance contracts notwithstanding any conflicting provisions of the Federal Acquisition Regulation and related Federal agency regulations.

(b) *Utility incentive programs.* Nothing in this subpart shall preclude a Federal agency from—

(1) Participating in programs to increase energy efficiency, conserve water, or manage electricity demand conducted by gas, water, or electric utilities and generally available to customers of such utilities;

(2) Accepting financial incentives, goods, or services generally available from any such utility to increase energy efficiency or to conserve water or manage electricity demand; or

(3) Entering into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of each Federal agency.

(c) *Promoting competition.* To the extent allowed by law, Federal agencies

should encourage utilities to select contractors for the conduct of utility incentive programs in a competitive manner to the maximum extent practicable.

(d) *Interpretations.* The permissive provisions of this subpart shall be liberally construed to effectuate the objectives of Title VIII of the National Energy Conservation Policy Act, 42 U.S.C. 8287–8287c.

§ 436.31 Definitions.

As used in this subpart—

Act means Title VIII of the National Energy Conservation Policy Act.

Annual energy audit means a procedure including, but not limited to, verification of the achievement of energy cost savings and energy unit savings guaranteed resulting from implementation of energy conservation measures and determination of whether an adjustment to the energy baseline is justified by conditions beyond the contractor's control.

Building means any closed structure primarily intended for human occupancy in which energy is consumed, produced, or distributed.

Detailed energy survey means a procedure which may include, but is not limited to, a detailed analysis of energy cost savings and energy unit savings potential, building conditions, energy consuming equipment, and hours of use or occupancy for the purpose of confirming or revising technical and price proposals based on the preliminary energy survey.

DOE means Department of Energy.

Energy baseline means the amount of energy that would be consumed annually without implementation of energy conservation measures based on historical metered data, engineering calculations, submetering of buildings or energy consuming systems, building load simulation models, statistical regression analysis, or some combination of these methods.

Energy conservation measures means measures that are applied to an existing Federally owned building or facility that improves energy efficiency, are life-cycle cost-effective under subpart A of this part, and involve energy conservation, cogeneration facilities, renewable energy sources, improvements in operation and maintenance efficiencies, or retrofit activities.

Energy cost savings means a reduction in the cost of energy and related operation and maintenance expenses, from a base cost established through a methodology set forth in an energy savings performance contract, utilized in an existing federally owned building or buildings or other federally owned facilities as a result of—

(1) The lease or purchase of operating equipment, improvements, altered operation and maintenance, or technical services; or

(2) The increased efficient use of existing energy sources by cogeneration or heat recovery, excluding any cogeneration process for other than a federally owned building or buildings or other federally owned facilities.

Energy savings performance contract means a contract which provides for the performance of services for the design, acquisition, installation, testing, operation, and, where appropriate, maintenance and repair of an identified energy conservation measure or series of measures at one or more locations.

Energy unit savings means the determination, in electrical or thermal units (e.g., kilowatt hour (kwh), kilowatt (kw), or British thermal units (Btu)), of the reduction in energy use or demand by comparing consumption or demand, after completion of contractor-installed energy conservation measures, to an energy baseline established in the contract.

Facility means any structure not primarily intended for human occupancy, or any contiguous group of structures and related systems, either of which produces, distributes, or consumes energy.

Federal agency has the meaning given such term in section 551(1) of Title 5, United States Code.

Preliminary energy survey means a procedure which may include, but is not limited to, an evaluation of energy cost savings and energy unit savings potential, building conditions, energy consuming equipment, and hours of use or occupancy, for the purpose of developing technical and price proposals prior to selection.

Secretary means the Secretary of Energy.

§ 436.32 Qualified contractors lists.

(a) DOE shall prepare a list, to be updated annually, or more often as necessary, of firms qualified to provide energy cost savings performance services and grouped by technology. The list shall be prepared from statements of qualifications by or about firms engaged in providing energy savings performance contract services on questionnaires obtained from DOE. Such statements shall, at a minimum, include prior experience and capabilities of firms to perform the proposed energy cost savings services by technology and financial and performance information. DOE shall issue a notice annually, for publication in the Commerce Business Daily, inviting submission of new statements of qualifications and requiring listed firms to update their statements of qualifications for changes in the information previously provided.

(b) On the basis of statements of qualifications received under paragraph (a) of this section and any other relevant information, DOE shall select a firm for inclusion on the qualified list if—

(1) It has provided energy savings performance contract services or services that save energy or reduce utility costs for not less than two clients, and the firm possesses the appropriate project experience to successfully implement the technologies which it proposes to provide;

(2) Previous project clients provide ratings which are ''fair'' or better;

(3) The firm or any principal of the firm has neither been insolvent nor declared bankruptcy within the last five years;

(4) The firm or any principal of the firm is not on the list of parties excluded from procurement programs under 48 CFR part 9, subpart 9.4; and

(5) There is no other adverse information which warrants the conclusion that the firm is not qualified to perform energy savings performance contracts.

(c) DOE may remove a firm from DOE's list of qualified contractors after notice and an opportunity for comment if—

(1) There is a failure to update its statement of qualifications;

(2) There is credible information warranting disqualification; or

(3) There is other good cause.

(d) A Federal agency shall use DOE's list unless it elects to develop its own list of qualified firms consistent with the procedures in paragraphs (a) and (b) of this section.

(e) A firm not designated by DOE or a Federal agency pursuant to the procedures in paragraphs (a) and (b) of this section as qualified to provide energy cost savings performance services shall receive a written decision and may request a debriefing.

(f) Any firm receiving an adverse final decision under this section shall apply to the Board of Contract Appeals of the General Services Administration in order to exhaust administrative remedies.

§ 436.33 Procedures and methods for contractor selection.

(a) *Competitive selection.* Competitive selections based on solicitation of firms are subject to the following procedures—

(1) With respect to a particular proposed energy cost savings

performance project, Federal agencies shall publish a Commerce Business Daily notice which synopsizes the proposed contract action.

(2) Each competitive solicitation—

(i) Shall request technical and price proposals and the text of any third-party financing agreement from interested firms;

(ii) Shall consider DOE model solicitations and should use them to the maximum extent practicable;

(iii) May provide for a two-step selection process which allows Federal agencies to make an initial selection based, in part, on proposals containing estimated energy cost savings and energy unit savings, with contract award conditioned on confirmation through a detailed energy survey that the guaranteed energy cost savings are within a certain percentage (specified in the solicitation) of the estimated amount; and

(iv) May state that if the Federal agency requires a detailed energy survey which identifies life cycle cost effective energy conservation measures not in the initial proposal, the contract may include such measures.

(3) Based on its evaluation of the technical and price proposals submitted, any applicable financing agreement (including lease-acquisitions, if any), statements of qualifications submitted under § 436.32 of this subpart, and any other information determines to be relevant, the Federal agency may select a firm on a qualified list to conduct the project.

(4) If a proposed energy cost savings project involves a large facility with too many contiguously related buildings and other structures at one site for proposing firms to assume the costs of a preliminary energy survey of all such structures, the Federal agency—

(i) May request technical and price proposals for a representative sample of buildings and other structures and may select a firm to conduct the proposed project; and

(ii) After selection of a firm, but prior to award of an energy savings performance contract, may request the selected firm to submit technical and price proposals for all or some of the remaining buildings and other structures at the site and may include in the award for all or some of the remaining buildings and other structures.

(5) After selection under paragraph (a)(3) or (a)(4) of this section, but prior to award, a Federal agency may require the selectee to conduct a detailed energy survey to confirm that guaranteed energy cost savings are within a certain percentage (specified in the solicitation) of estimated energy cost savings in the selectee's proposal. If the detailed energy survey does not confirm that guaranteed energy savings are within the fixed percentage of estimated savings, the Federal agency may select another firm from those within the competitive range.

(b) *Unsolicited proposals.* Federal agencies may—

(1) Consider unsolicited energy savings performance contract proposals from firms on a qualified contractor list under this subpart which include technical and price proposals and the text of any financing agreement (including a lease-acquisition) without regard to the requirements of 48 CFR 15.503 (a) and (c); 48 CFR 15.506–2(a)(1); and 48 CFR 15.507(a), (b)(2), (b)(3), (b)(4) and (b)(5).

(2) Reject an unsolicited proposal that is too narrow because it does not address the potential for significant energy conservation measures from other than those measures in the proposal.

(3) After requiring a detailed energy survey, if appropriate, and determining that technical and price proposals are adequate, award a contract to a firm on a qualified contractor list under this subpart on the basis of an unsolicited proposal, provided that the Federal agency complies with the following procedures—

(i) An award may not be made to the firm submitting the unsolicited proposal unless the Federal agency first publishes a notice in the Commerce Business Daily acknowledging receipt of the proposal and inviting other firms on the qualified list to submit competing proposals.

(ii) Except for unsolicited proposals submitted in response to a published general statement of agency needs, no award based on such an unsolicited proposal may be made in instances in which the Federal agency is planning the acquisition of an energy conservation measure through an energy savings performance contract.

(c) *Certified cost or pricing data.*

(1) Energy savings performance contracts under this part are firm fixed-price contracts.

(2) Pursuant to the authority provided under section 304A(b)(1)(B) of the Federal Property and Administrative Services Act of 1049, the heads of procuring activities shall waive the requirement for submission of certified cost or pricing data. However, this does not exempt offerors from submitting information (including pricing information) required by the Federal agency to ensure the impartial and comprehensive evaluation of proposals.

§ 436.34 Multiyear contracts.

(a) Subject to paragraph (b) of this section, Federal agencies may enter into a multiyear energy savings performance contract for a period not to exceed 25 years, as authorized by 42 U.S.C. 8287, without funding of cancellation charges, if:

(1) The multiyear energy savings performance contract was awarded in a competitive manner using the procedures and methods established by this subpart;

(2) Funds are available and adequate for payment of the scheduled energy cost for the first fiscal year of the multiyear energy savings performance contract;

(3) Thirty days before the award of any multiyear energy savings performance contract that contains a clause setting forth a cancellation ceiling in excess of $750,000, the head of the awarding Federal agency gives written notification of the proposed contract and the proposed cancellation ceiling for the contract to the appropriate authorizing and appropriating committees of the Congress; and

(4) Except as otherwise provided in this section, the multiyear energy savings performance contract is subject to 48 CFR part 17, subpart 17.1, including the requirement that the contracting officer establish a cancellation ceiling.

(b) Neither this subpart nor any provision of the Act requires, prior to contract award or as a condition of a contract award, that a Federal agency have appropriated funds available and adequate to pay for the total costs of an energy savings performance contract for the term of such contract.

§ 436.35 Standard terms and conditions.

(a) *Mandatory requirements.* In addition to contractual provisions otherwise required by the Act or this subpart, any energy savings performance contract shall contain clauses—

(1) Authorizing modification, replacement, or changes of equipment, at no cost to the Federal agency, with the prior approval of the contracting officer who shall consider the expected level of performance after such modification, replacement or change;

(2) Providing for the disposition of title to systems and equipment;

(3) Requiring prior approval by the contracting officer of any financing agreements (including lease-acquisitions) and amendments to such an agreement entered into after contract award for the purpose of financing the

acquisition of energy conservation measures;

(4) Providing for an annual energy audit and identifying who shall conduct such an audit, consistent with § 436.37 of this subpart; and

(5) Providing for a guarantee of energy cost savings to the Federal agency, and establishing payment schedules reflecting such guarantee.

(b) *Third party financing.* If there is third party financing, then an energy savings performance contract may contain a clause:

(1) Permitting the financing source to perfect a security interest in the installed energy conservation measures, subject to and subordinate to the rights of the Federal agency; and

(2) Protecting the interests of a Federal agency and a financing source, by authorizing a contracting officer in appropriate circumstances to require a contractor who defaults on an energy savings performance contract or who does not cure the failure to make timely payments, to assign to the financing source, if willing and able, the contractor's rights and responsibilities under an energy savings performance contract;

§ 436.36 Conditions of payment.

(a) Any amount paid by a Federal agency pursuant to any energy savings performance contract entered into under this subpart may be paid only from funds appropriated or otherwise made available to the agency for the payment of energy expenses and related operation and maintenance expenses which would have been incurred without an energy savings performance contract. The amount the agency would have paid is equal to:

(1) The energy baseline under the energy savings performance contract (adjusted if appropriate under § 436.37), multiplied by the unit energy cost; and

(2) Any related operations and maintenance cost prior to implementation of energy conservation measures, adjusted for increases in labor and material price indices.

(b) Federal agencies may incur obligations pursuant to energy savings performance contracts to finance energy conservation measures provided guaranteed energy cost savings exceed the contractor's debt service requirements.

§ 436.37 Annual energy audits.

(a) After contractor implementation of energy conservation measures and annually thereafter during the contract term, an annual energy audit shall be conducted by the Federal agency or the contractor as determined by the contract. The annual energy audit shall verify the achievement of annual energy cost savings performance guarantees provided by the contractor.

(b) The energy baseline is subject to adjustment due to changes beyond the contractor's control, such as—

(1) Physical changes to building;

(2) Hours of use or occupancy;

(3) Area of conditioned space;

(4) Addition or removal of energy consuming equipment or systems;

(5) Energy consuming equipment operating conditions;

(6) Weather (i.e., cooling and heating degree days); and

(7) Utility rates.

(c) In the solicitation or in the contract, Federal agencies shall specify requirements for annual energy audits, the energy baseline, and baseline adjustment procedures.

§ 436.38 Terminating contracts.

(a) Except as otherwise provided by this subpart, termination of energy savings performance contracts shall be subject to the termination procedures of the Federal Acquisition Regulation in 48 CFR part 49.

(b) In the event an energy savings performance contract is terminated for the convenience of a Federal agency, the termination liability of the Federal agency shall not exceed the cancellation ceiling set forth in the contract, for the year in which the contract is terminated.

[FR Doc. 95–8750 Filed 4–7–95; 8:45 am]

BILLING CODE 6450–01–P